Supreme Court, U.S.
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No. 98-

In the

Supreme Court of the United States

OCTOBER TERM, 1998

CHARLES C. CARELLA, Trustee/Receiver
Under Orders of the United States District Court
for the District of New Jersey,

Petitioner,

v.

THE STATE OF NEW JERSEY, DEPARTMENT OF TREASURY, By Samuel Crane, Treasurer,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

PETITION FOR WRIT OF CERTIORARI

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41 pp

QUESTIONS PRESENTED TO THE COURT

1. Did the State of New Jersey violate the due process clause of the Fourteenth Amendment of the United States Constitution when it refused to return $2.25 million paid as state income taxes to a "taxpayer" who neither lived nor earned income in the State of New Jersey?

2. Whether the State of New Jersey violates the Privileges and Immunities Clause of the United States Constitution by denying a non-resident taxpayer the same rights as a resident taxpayer with regard to recalculation of income tax liability.

PARTIES TO THE PROCEEDING

The parties to the proceedings below were Petitioner, Charles C. Carella, Trustee/Receiver, under Orders of the United States District Court for the District of New Jersey, and Respondent, the State of New Jersey, Department of Treasury, by Samuel Crane, Treasurer.

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CHARLES C. CARELLA, Trustee/Receiver
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THE STATE OF NEW JERSEY, DEPARTMENT OF
TREASURY, By Samuel Crane, Treasurer,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF NEW JERSEY

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of New Jersey issued January 23, 1999 and the decision below.

OPINIONS BELOW

The judgment of the Supreme Court of the State of New Jersey entered on January 23, 1999, denying Petitioner's Petition for Certification has not been reported and is represented in the Appendix hereto, p. A-1.

The Opinion and Order of the Appellate Division, New Jersey Superior Court, filed December 4, 1998 is not reported and is reprinted in its original form in the Appendix hereto, p. A-3.

The Opinion of the Chancery Division of the New Jersey Superior Court entered on May, 20, 1997 is reprinted in the Appendix hereto, at p. A-9.

JURISDICTION

In the Eighth Count of its amended complaint, Petitioner asserted a claim of violation of due process.

On appeal, Petitioner asserted at pages 10 through 21 of its principal brief in appeal number A-6490-96T1 that the Due Process Clause of the United States Constitution required that the court below conclude that the State of New Jersey was not entitled to monies paid to it by Eddie Antar as income taxes because there was no constitutional nexus between Antar and New Jersey. At pages 44 through 48, Petitioner also asserted that allowing residents an unlimited time period to recalculate income tax liability owed to New Jersey when a sister state recomputed income that that was owed to the New Jersey citizen violated the Privileges and Immunities Clause of the U.S. Constitution insofar as non residents could only seek a recalculation for set number of years. The Appellate Division of the Superior Court of New Jersey affirmed the orders below, and did not address the issues of the demand of due process and privileges and immunities.

On petition and appeal to the New Jersey Supreme Court, the due process issue was presented at pages 8 through 13 and the privileges and immunities issue at pages 18 through 19 but the New Jersey Supreme Court declined to review.

The jurisdiction of this Court to review the Opinion and Judgment of the New Jersey Supreme Court is invoked under 28 U.S.C. § 1257(a).

THE CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. amendment XIV, Section 1.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. art. IV, §1, cl.1

The citizen of each state shall be entitled to all Privileges and Immunities of Citizens in the several states.

STATEMENT OF THE CASE

Eddie Antar was the founder and largest shareholder of Crazy Eddie, Inc., a chain of retail electronics stores, and was popularly known in the New York metropolitan area as "Crazy Eddie." During his control of Crazy Eddie, Antar engaged in numerous acts of securities fraud.

Charles C. Carella, Trustee/Receiver ("Trustee") was appointed by Hon. Nicholas H. Politan, U.S.D.J. in March 1990, in *Securities and Exchange Commission v. Eddie Antar*, Civil Action No. 89-3773 (NHP) in United States District Court for the District of New Jersey. The Trustee was charged by the federal court with responsibilities to collect and marshal all of Antar's assets for the purpose of creating a fund to satisfy claims against Antar. In July 1990 judgment was entered and an order issued expanding the Trustee's mandate to collect all of Antar's assets to enforce the judgment.

In January 1991, the Trustee first became aware that Antar had committed tax fraud when the State of New York, Department of Taxation and Finance ("New York") filed a Tax Warrant assessing taxes due totaling approximately $5.5 million against Antar for tax years 1984, 1985 and 1986. A second Tax Warrant was issued in February 1991 for additional taxes due totaling almost $1 million for tax years 1984 and 1985. The Tax Warrants were issued as a result of a review and readjustment of Antar's New York tax obligations for those years.

Shortly after receiving the first Tax Warrant, the Trustee commenced an inquiry into all of Antar's income tax returns. As part of that investigation, the Trustee examined Antar's New York and New Jersey tax records and collected evidence to establish Antar's residence during the years in question.

Having amassed substantial evidence to establish that Antar had fraudulently declared New Jersey as his residence in order to evade greater income tax liability to New York, where he actually lived, counsel for the Trustee, on October 31, 1991, met with representatives of the State of New Jersey. The purpose of the meeting was, in part, to formally seek recovery of the fraudulent tax payments made by Antar to New Jersey.

The State understood that a claim had been effectively filed as evidenced by the November 4, 1991, letter from Deputy Attorney General Hamill to A. Richard Ross. In the letter DAG Hamill wrote: "We appreciate the opportunity to discuss with you the receiver's claim against the State of New Jersey for gross income taxes paid by Eddie Antar."

In addition, within one week of the October 31, 1991 meeting, the Trustee furnished to the State thousands of pages of other materials further establishing the necessary proof for the Trustee's claims.

On June 18, 1992, New York formally notified the Trustee of its claim against Antar, relying on the Trustee to recover income taxes owing to New York.

When the State took no action as to the claim presented by the Trustee, an action was commenced in New Jersey Superior Court. The complaint alleged, among other things, that Eddie Antar, as part of his many unlawful activities, filed and paid income taxes to the State of New Jersey in 1985, 1986, and 1987, falsely claiming New Jersey residence in order to avoid greater tax liability in New York City, where he actually lived during that time. The complaint went on to allege that the State had no legal authority to receive the money paid to it by Antar, since a nonresident could not be subject to a tax for income earned outside of the state.

By leave of court, the Trustee filed his First Amended Complaint on April 14, 1993, to further allege, among other things, violation of due process.

The case was tried on December 16, 1996. After the Trustee presented his case in chief the State rested without a submission of any kind.

The trial judge in a Memorandum Opinion dated May 20, 1997, dismissed the claims by the Trustee. This was incorporated in a Final Judgment dated June 5, 1997.

Timely appeal was filed to the Superior Court of New Jersey, Appellate Division. In a *per curiam* Opinion dated December 4, 1998, the Appellate Division affirmed essentially for the reasons stated by the trial court in the written opinions of October 18, 1994, March 7, 1995 and May 20, 1997.

An appeal was filed to the New Jersey Supreme Court, which dismissed the appeal in an Order entered January 23, 1999.

REASONS FOR GRANTING THE WRIT

A. THE STATE OF NEW JERSEY HAD NO RIGHT TO RETAIN MONIES PAID BY ANTAR AS INCOME TAXES.

Apparently ignoring all the uncontradicted and unimpeached evidence introduced at trial by the Trustee, and further ignoring the voluminous pretrial admissions made by the State, official records of legal proceedings in other jurisdictions and the public records of such other jurisdictions, the courts below erroneously considered Antar to have been a New Jersey resident taxpayer. Although Antar (as part of a fraudulent scheme) paid monies to the State of New Jersey as if he were a resident taxpayer, he never met

the statutory requirements for a taxpayer and, thus, the State had no right to retain monies paid as income taxes. As a result, New Jersey has improvidently collected income taxes from a person who is not subject to paying any income taxes.

The fundamental underpinning of a state's power to tax is that there be "'some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.'" *Allied-Signal v. Director, Division of Taxation*, 504 U.S. 768, 777 (1992), *quoting Miller Bros. Co. v. Maryland*, 347 U.S. 340, 344-45, (1954); *see also Quill Corp. v. North Dakota*, 504 U.S. 298, (1992). Stated another way, "the Due Process Clause of the United States Constitution prohibits a state from taxing income earned beyond its borders." *CIT Financial Services v. Director, Division of Taxation*, 4 N.J. Tax 468, 577 (Tax Ct. 1982) (citations omitted). The undisputed — indeed, wholly uncontested — evidence presented in the courts below shows the complete absence of any nexus between Antar and New Jersey entitling it to impose its taxing power.

1. Antar Received No New Jersey Source Income.

At trial the Trustee demonstrated that Eddie Antar did not derive any income from any source within the State of New Jersey during the relevant time period, and that he was employed in New York. The State presented no evidence to the contrary as there is none.

2. Antar Was Not A Resident Taxpayer.

The New Jersey income tax scheme provides for only two categories of persons who may be taxed as "resident taxpayers": (1) Persons who are domiciled in New Jersey, unless they maintain no permanent place of abode in New Jersey, maintain a permanent place of abode outside of New Jersey, and spend no more than an aggregate of 30 days in

New Jersey during the taxable year; and (2) persons not domiciled in New Jersey, who maintain a permanent place of abode in New Jersey, and spend an aggregate of at least 183 days in New Jersey during the taxable year. N.J.S.A. 54A:1-2(m). If Antar was not a resident taxpayer, then by definition he was a "nonresident taxpayer" pursuant to N.J.S.A. 54A:1-2(n), which permits the imposition of New Jersey's gross income tax only upon the portion of income derived from sources within New Jersey. N.J.S.A. 54A:2-1.1.

New Jersey courts have defined domicile in the context of tax liability for gross income taxes as a showing of (1) physical presence and (2) the intention to remain there indefinitely. *Wolff v. Director, Division of Taxation*, 9 N.J.Tax 11, 17 (Tax Ct. 1986). A person's residence indicates no more than physical presence within a state. *Id.* While a taxpayer may have multiple residences, he may have only one domicile. *Goffredo v. Director, Division of Taxation*, 9 N.J.Tax 135, 145-46 (Tax Ct. 1987) (citing *Trustees of Princeton University v. Trust Co. of N.J.*, 22 N.J. 587, 595 (1956)).

Moreover, a person's domicile remains unchanged until a new domicile is established. *Quick v. Director, Division of Taxation*, 9 N.J.Tax 288, 294 (Tax Ct. 1987) (citing *Lyon v. Glaser*, 60 N.J. 259, 277 (1972)). A new domicile requires proof of an intent to abandon the former domicile. *Quick*, 9 N.J. Tax at 294. (citation omitted). For example, in *Goffredo*, the court held that although the taxpayers purchased a new home in Pennsylvania and resided there for 16 years, they remained domiciled in New Jersey because, *inter alia*, they demonstrated continuous links to New Jersey. *Id.* at 146-49.

The evidence at trial, again uncontested, showed that from May 1978 to January 1984, Eddie Antar resided at 2123 East 3rd Street, Brooklyn, New York, with his wife, Deborah Rosen Antar, and their children. In May 1984, Eddie Antar and Deborah Rosen Antar entered into a separation

agreement. As part of the separation agreement,[1] Deborah Rosen Antar was awarded *exclusive* use of the house at 5 Saxony Drive, Oakhurst, New Jersey and the house at 2123 East 3rd Street, Brooklyn, New York.

Beginning as early as January 1984, Eddie Antar took up residence at 401 East 80th Street, New York, New York, where he lived with Deborah Susan Ehrlich, his then girlfriend. He later married Deborah Ehrlich and continued to live at 401 East 80th Street with Deborah Ehrlich Antar through at least 1989. No evidence was presented at trial that Eddie Antar ever repudiated New York City as his residence during 1984, 1985 and 1986. No evidence was presented at trial to show that Eddie Antar traveled to and stayed in the State of New Jersey 183 days or more in any year. In fact, the State readily admits that it has absolutely no indicia that Eddie Antar demonstrated an intent to live in New Jersey, i.e., no voting records, driver's license, ownership of motor vehicles, or any other record of an intent to be domiciled in New Jersey, all of which the Trustee knew from pre-claim investigations.

In short, the State failed to present any evidence contradicting the fact that Eddie Antar's domicile remained in New York. *See Goffredo*, 9 N.J.Tax at 145 (holding that the burden of establishing a change in domicile rests upon the party asserting it). Antar never abandoned New York and never established domicile in New Jersey. Thus, while "one can establish a domicile for tax purposes ... one cannot pay taxes to establish a domicile." *Wolff v. Director, Division of Taxation*, 9 N.J.Tax 11, 22 (Tax Ct. 1986). Antar's payment of "taxes" to the State did not establish domicile.

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[1] The separation agreement is particularly determinative as it shows that Eddie Antar, although suggesting to the State that he resided at 5 Saxony Drive, had no right to declare it as his residence.

3. The Trustee Made Oral And Written Claims To The State.

The Trustee, at trial, offered the testimony of A. Richard Ross, lead counsel for the Trustee in the SEC action. Mr. Ross testified that, beginning no later than October 31, 1991, he advised New Jersey of the Trustee's investigation and conclusion therefrom. Mr. Ross further advised New Jersey that the Trustee was seeking return of the monies paid by Antar to New Jersey as income taxes on the ground that New Jersey had no right to collect or retain same because Antar neither lived nor worked in New Jersey.

It is not disputed that among the matters discussed at the October 31 meeting between the Trustee and representatives of the Attorney General and the Division of Taxation, was the fact that the Trustee was making a claim against the State for taxes paid by Eddie Antar who fraudulently declared and filed income tax returns contending that he was a resident of New Jersey when in fact he actually resided in New York. It has also not been challenged by the State that as a result of the October 31 meeting, it either commenced or continued investigating the Trustee's claim that Eddie Antar owed no taxes as a resident of New Jersey because he lived in New York.

The Trustee was also led to believe that the October 31 meeting constituted notice to the State of a claim for return of tax monies improperly paid to New Jersey, especially where the State, in correspondence to the Trustee, expressly characterized the meeting as one where a "claim" has been made. And, at no time prior to this action did the State object to the form or substance of the Trustee's claim "on the ground that it was informal, deficient in its content or untimely." *United States v. Kales*, 314 U.S. 183, 196 (1941). To the contrary, the State's conduct both in words and actions, consistently treated the Trustee's communications as a claim.

Lastly, time and time again, the trial court readily acknowledged that the November 1991 letter constituted written evidence of a claim.

4. The Trial Court's Analysis.

Resting on the opinion of the trial court, the courts below endorsed that no "refund claim" could be considered unless filed within the time prescribed by law thus treating the Trustee's claim as a garden variety income tax refund dispute. However the claim was not for a refund. It was an action to recover from the State of New Jersey all of the money paid by or on behalf of Eddie Antar to the Division of Taxation as income taxes when in truth the State of New Jersey was not entitled to any of it because Antar was neither a resident of this State nor did he work here during the relevant period.

The trial court's reliance on *Continental Trailways v. Director, Division of Motor Vehicles*, 102 N.J. 526 (1986), *cert. denied*, 481 U.S. 1001, (1987) is therefore misplaced. In *Continental Trailways*, the core dispute was whether the taxpayer could recover taxes paid prior to its claim where the statute authorizing the tax levy was constitutionally infirm. Here, there is no challenge to a statute; this is a challenge to New Jersey's fundamental ability to retain monies fraudulently paid as "taxes" where there is no lawful right to same.

A second reason given by the trial court in dismissing the action was that there was no due process violation since Antar voluntarily filed and paid the tax shown. The trial court reasoned that New Jersey did not attempt to reach beyond its borders to assess or collect the tax, and that Antar's own acts "conferred jurisdiction" by the State upon the tax monies at issue. Here, the conclusions of the court below confused the issue of jurisdiction over the person, with the issue of

whether there was an obligation by Antar to pay income taxes.

In dismissing this claim, the trial court found that Antar was properly subject to the New Jersey gross income tax if he had minimum contacts with New Jersey. In support of this conclusion, the court relied on *Quill*, *supra*. However, *Quill* stands for the proposition that an out-of-state person or business may be subject to state tax for income attributable to activity in the state i.e., conducting business in New Jersey. The Court in *Quill* did not hold that the out-of-state taxpayer would be subject to tax on all income derived from all activity within and outside the state merely because it had minimum contacts with North Dakota. Nonetheless, the trial judge ruled exactly this, namely, that since Antar may have had joint ownership in realty in New Jersey during 1984, 1985, and 1986, all of his income, from whatever source, is subject to the gross income tax as if he were a resident taxpayer. The Court in *Quill* never suggested or intended that result.

The trial court also ignored that New Jersey imposed penalties and interest that were not voluntarily paid. The uncontested evidence showed that Antar was compelled to pay interest and penalties or be subject to civil and/or criminal penalties. These sums were mandated by the State and not freely offered by Antar.

By failing to retain monies paid by Antar as income taxes, New Jersey has exceeded the boundaries of taxation.

B. DENYING A NONRESIDENT TAXPAYER THE SAME RIGHTS AS A RESIDENT TAXPAYER CONTRAVENES THE PRIVILEGES AND IMMUNITIES CLAUSE OF THE U.S. CONSTITUTION.

If Antar is deemed to be a non-resident taxpayer, he should be entitled to readjust his New Jersey tax liability as a result of his recalculated New York tax liability. However, New Jersey subjects nonresident taxpayers to double taxation while avoiding the political consequences of causing the same loss to its own residents. The Constitution stands in the way of such blatant, discrimination.

The Privileges and Immunities Clause provides that the "Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." Article IV, §2.[2] The Privileges and Immunities Clause protects nonresidents from discrimination with regard to activity "sufficiently basic to the livelihood of the Nation'" and "bearing on the vitality of the Nation as a single entity....'" *Supreme Court of Virginia v. Friedman*, 487 U.S. 59, 64-65 (1988) (citations omitted).

As provided by N.J.S.A. 54A:4-1(e), where a resident taxpayer is required to pay taxes to another jurisdiction for income source to that state, and the sister jurisdiction later readjusts the tax owed, the Director of the Division of Taxation "shall redetermine the tax for any years affected regardless of any otherwise applicable statute of limitations." This provision applies only to resident taxpayers. *See also Guzzardi v. Director, Division of Taxation*, 15 N.J.Tax 395, 406 (Tax Ct. 1995). As a result, a nonresident who has paid tax to New Jersey is denied the statutorily created right to

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[2] Similar language appears in the Fourteenth Amendment ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States...").

have his New Jersey tax liability readjusted if the nonresident's home state determines the tax liability after the expiration of New Jersey's applicable statute of limitations for refund claims. The nonresident is then victimized by double taxation because of New Jersey's discrimination. Residents have unlimited time to seek readjustment; nonresidents do not.

New Jersey has fashioned N.J.S.A. 54A:4-1 to provide for readjustment without any statute of limitations being imposed on a resident. So New Jersey, while presumably counting on funds paid as gross income taxes to fashion its annual budgets, recognizes that there are instances when some of the money collected as gross income taxes may have to be returned to a "resident" taxpayer. The same opportunity for readjustment does not follow for a nonresident.

In *Lunding v. New York Tax Appeals Tribunal*, 522 U.S. 287, (1998), this Court held that, in order for a state tax provision to survive a constitutional challenge, the State must show (a) a substantial reason for the different treatment, and (b) that the discrimination bears a substantial relationship to the state's objective (*citing Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 284 (1985)). The Court also noted that review of a statute should be "substantially more rigorous" where disparate treatment of individual taxpayers is at issue. *Id.* at 775 (*citing Shaffer v. Carter*, 252 U.S. 37, 55 (1920).) In *Lunding* the Court concluded that the state tax statute at issue violated the Privileges and Immunities Clause of Article IV §2 of the United States Constitution. The discrimination against nonresident taxpayers inherent in New Jersey's tax scheme likewise violates the Privileges and Immunities Clause. "[W]here the question is whether a state taxing law contravenes rights secured by [the Federal Constitution], the decision must depend not upon any mere question of form, construction, or definition, but upon the practical operation and effect of the tax imposed." *Lunding* 522 U.S. at _____, 118 S. Ct. at 774 (*quoting Shaffer v. Carter*, 252 U.S. 37, 55 (1920)). *See also*

St. Louis Southwestern R. Co. v. Arkansas, 235 U.S. 350, 362 (1914) ("[W]hen the question is whether a tax imposed by a State deprives a party of rights secured by the Federal Constitution [w]e must regard the substance rather than the form and the controlling test is to be found in the operation and effect of the law as applied and enforced by the State"). Thus, the constitutionality of the readjustment provision must be measured by its effect rather than by whether there is a bona fide reason for granting a credit to resident taxpayers.

The Trustee recognizes that adjustment is made to the credit given to resident taxpayers for tax paid to a foreign state, and that technically, the resident taxpayer does not receive a "refund." This is clearly form over substance. As long as a foreign state revises the taxes owed for a given year, by allowing the resident taxpayer to increase the credit provided by N.J.S.A. 54A:4-1, New Jersey effectively grants, at any time, a refund of taxes to a resident taxpayer.

CONCLUSION

For all of the reasons stated above the petition for certiorari should be granted.

Respectfully submitted,

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Dated: May 24, 1999

APPENDIX

APPENDIX

SUPREME COURT OF NEW JERSEY

C-731 September Term 1998

CHARLES C. CARELLA, et al.,

Plaintiffs-Petitioners,

v.

THE STATE OF NEW JERSEY, DEPARTMENT OF TREASURY, et al.,

Defendants-Respondents.

[Filed Feb. 26, 1999]

CORRECTED ORDER ON PETITION FOR CERTIFICATION

47,219

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-6490-96 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied, with costs; and it is further

ORDERED that the notice of appeal filed in the within matter is dismissed pursuant to *Rule* 2:12-9.

WITNESS, the Honorable Deborah T. Portiz, Chief Justice, at Trenton, this 23rd day of February, 1999.

/s/ Stephen W. Townsend
Clerk of the Supreme Court

SUPREME COURT OF NEW JERSEY

C-731 September Term 1998

CHARLES C. CARELLA, et al.,

Plaintiffs-Petitioners,

v.

THE STATE OF NEW JERSEY, DEPARTMENT OF TREASURY, et al.,

Defendants-Respondents.

[Filed Feb. 24, 1999]

ON PETITION FOR CERTIFICATION

47,219

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-6490-96 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied, with costs.

WITNESS, the Honorable Deborah T. Portiz, Chief Justice, at Trenton, this 23rd day of February, 1999.

/s/ Stephen W. Townsend
Clerk of the Supreme Court

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

CHARLES C. CARELLA,
et al.,

Plaintiff-Appellant,

v.

THE STATE OF NEW JERSEY,
DEPARTMENT OF TREASURY,
By Samuel Crane, Treasurer,

Defendant-Respondent.

[Filed Dec. 4, 1998]

A-6490-96T1

Argued November 17, 1998 - Decided December 4, 1998
Before Judge Muir, Jr., Keefe, and Coburn.
On appeal from Superior Court of New Jersey
Chancery Division, Essex County:

Dennis F. Gleason argued the cause for appellant (Carella, Byrne, Bain, Gilfillan, Cecchi, Stewart & Olstein, attorneys; Mr. Gleason and Andrew P. Gordon, on the brief).

Gail L. Menyuk, Deputy Attorney General, argued the cause for respondent (Peter Verniero, Attorney General, attorney; Mary C. Jacobson, Assistant Attorney General, of counsel; Ms. Menyuk, Deputy Attorney General, on the brief).

PER CURIAM

During the mid-to-late 1980's, Eddie Antar, the main shareholder of Crazy Eddie, Inc., repeatedly declared himself to be a resident of New Jersey in tax returns he voluntarily filed pursuant to the provisions of the New Jersey Gross Income Tax Act, *N.J.S.A.* 54A:-1-1 *et seq.* Following Antar's conviction for stock fraud, plaintiff, Charles C. Carella, was appointed by a federal court as trustee/receiver with the responsibility of marshaling Antar's assets. Believing that Antar had falsely claimed residence in New Jersey for the purpose of avoiding a greater income tax liability to the State of New York, which plaintiff claims was Antar's true residence during the years in question, plaintiff instituted this action on behalf of Antar's creditors for a refund of the taxes paid to New Jersey. A final judgment was entered for defendant on June 5, 1997. Plaintiff appeals, offering the following points of alleged error:

POINT I

THE UNCONTESTED EVIDENCE SHOWS THAT ANTAR WAS NOT A NEW JERSEY RESIDENT AND RECEIVED NO NEW JERSEY SOURCE INCOME. ACCORDINGLY THE STATE HAD NO RIGHT TO RETAIN MONIES PAID BY ANTAR AS INCOME TAXES.

A. Antar Received No New Jersey Source Income.

B. Antar Was Not a Resident Taxpayer.

C. The Trustee Made Oral and Written Claims to The State.

D. The Trial Court's Analysis.

POINT II

THE TRUSTEE WAS BARRED FROM INTRODUCING OTHER EVIDENCE THAT A CLAIM HAD BEEN MADE AND THAT ANTAR WAS NOT A RESIDENT OF NEW JERSEY.

A. The Testimony of Judge Hamill.

B. The Court's Decision Not To Allow Sam E. Antar To Testify At Trial.

POINT III

IT WAS ERROR FOR THE TRIAL COURT TO LIMIT THE CLAIMS OF THE TRUSTEE

A. As This Is Not A "Refund" Case, The Trial Court Erred In Ruling That The Income Tax Refund State Is The Exclusive Remedy To The Trustee.

B. The Trustee Made A Timely Claim For A Refund For 1984 And 1986 Taxes Paid By Antar In December 1989 On The Basis That Antar Was Never A New Jersey Resident.

C. Equitable Tolling Of The Statute Of Limitations Is Warranted Here.

1. The exceptional circumstances of this case.

2. Equitable tolling is warranted where the State intentionally withheld information until after the statute of limitations had expired.

   (a) The State's legal obligation to disclose the December 7, 1989 payments.

   (b) Evidence of Antar's December 1989 payments was material to the trustee's claim.

(c) The Trustee could not have readily learned of the concealed information without the State's disclosure.

(d) The State intentionally failed to timely disclose the 1989 tax payments to Trustee.

(e) The Trustee was harmed by relying on the non-disclosure.

D. The Trial Court Erred in Granting Summary Judgment On the State's *Vicoa* Defense.

1. There was a binding admission by the State.

2. Amendment of the admission was unwarranted, undeserving and untimely.

3. Prejudice to the Trustee.

POINT IV

IF THE TRUSTEE FAILED TO DEMONSTRATE THAT ANTAR WAS A NONRESIDENT THEN THE TRIAL COURT ERRED IN DENYING THE TRUSTEE'S CLAIM FOR A READJUSTMENT SINCE (A) THE PLAIN LANGUAGE OF *N.J.S.A.* 54A:1 DOES NOT REQUIRE ACTUAL PAYMENT BE MADE BEFORE A READJUSTMENT IS REQUIRED; (B0 A NEW JERSEY COURT HAS NO JURISDICTION TO DETERMINE IF THE NEW YORK TAX IS PROPER; AND (C) IT WAS IMPROPER FOR THE TRIAL COURT TO REQUIRE THAT THE CLAIM COULD SURVIVE ONLY IF THE TRUSTEE ALLEGED NEW YORK AND NEW JERSEY RESIDENCY.

A. The Plain Language of *N.J.S.A.* 54A:4-1 Does Not Require Actual Payment To the Foreign Jurisdiction

Before the Director is Required To Readjust a Resident's Tax Credit.

B. The New Jersey Chancery Division Court Is Without Jurisdiction To Find That New York's Reassessment of Taxes From the Sale of Stock Was Improper.

C. It Was Improper For The Court Below To Require The Trustee To Plead Dual New Jersey and New York Residency.

POINT V

THE TRIAL JUDGE ERRED BY DENYING A NONRESIDENT TAXPAYER THE SAME RIGHTS AS A RESIDENT TAXPAYER, IN CONTRAVENTION OF THE PRIVILEGES AND IMMUNITIES CLAUSE.

POINT VI

THE TRIAL JUDGE COMMITTED ERROR WHEN HE DID NOT RECUSE HIMSELF AFTER EXCLUDING TESTIMONY AT TRIAL OF A TAX COURT COLLEAGUE.

Based on our review of the record and briefs, we are satisfied that the judgment of the trial court is based on findings of fact which are adequately supported by evidence and that all issues of law raised are clearly without merit. *R.* 2:11-3(e(1)(A) and (E). We affirm essentially for the reasons stated by Judge Crabtree in his written opinions of October 18, 1994, March 7, 1995, and My 20, 1997.

In light of our affirmance, the defendant's cross-appeal is moot and is hereby dismissed.

Affirmed.

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION - ESSEX COUNTY

CHARLES C. CARELLA,
Trustee/Receiver Under Orders of
the United States District Court for
the District of New Jersey

[Filed June 5, 1997]

Plaintiff,

v.

DOCKET NO.
C-102-92

THE STATE OF NEW JERSEY,
DEPARTMENT OF TREASURY,
By Samuel Crane, Treasurer,

Defendant.

Civil Action

FINAL JUDGMENT

Plaintiff's claim remaining after the Court's opinion of October 18, 1994, as modified by the Court's order of December 12, 1996 granting defendant's motion for partial summary judgment, having been tried before the Court, and for the reasons set forth in the Court's memorandum opinion of May 20, 1997, the Court having determined that they are without merit, those remaining claims are hereby dismissed.

/s/ David E. Crabtree, J.T.C., t/a

Dated: June 5, 1997.

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION: ESSEX COUNTY

CHARLES C. CARELLA, Trustee/ Receiver Under Orders of the United States District Court for the District of New Jersey,

Plaintiff,

v.

THE STATE OF NEW JERSEY, DEPARTMENT OF THE TREASURY, By Samuel Crane, Treasurer,

Defendant.

MEMORANDUM OPINION

DOCKET NO. C-102-92

Decided: May 20, 1997

Dennis F. Gleason for plaintiff (Carella, Byrne,Bain, Gilfillan, Cecchi, Stewart & Olstein, attorneys).

Gail L. Menyuk for defendant (Peter Verniero, Attorney General of New Jersey, attorney).

CRABTREE, J.T.C., temporarily assigned.

This is the concluding chapter (at least at the trial level) of the bizarre saga involving plaintiff's efforts to recover over $2,000,000 in gross income taxes paid to the State of New Jersey by Eddie Antar ("Crazy Eddie") for the years 1984 through 1987. The fraudulent behavior of Antar is by now legendary. In the course of his criminal conduct he has victimized his erstwhile shareholders, his creditors and the taxing authorities of the State of New York.

Plaintiff, in this action, seeks to recover New Jersey gross income taxes which Antar voluntarily paid to defendant with respect to tax years 1984 through 1987. The taxes paid by Antar with the returns filed for those years aggregated $2,359,820. In addition, Antar made New Jersey gross income tax payments, on December 7, 1989, of $8,652.60 and $62,378.98 for 1984 and 1986, respectively.

In an opinion of October 18, 1994, this court ruled that *N.J.S.A.* 54A:9-8(a) was the exclusive remedy for the recovery of alleged overpayments of New Jersey gross income taxes, and plaintiff would be given the opportunity to prove at the trial of this case that (1) written refund claims were filed within three years of the filing of the tax returns with respect to which taxes were paid, or two years after the actual payment of those taxes, whichever was later, and (2) that plaintiff was entitled to recover those tax payments because they were paid in violation of Antar's rights under the Fourteenth Amendment to the United States Constitution, i.e., there was no nexus between Antar and the State of New Jersey so as to support the State's power to tax Antar's income earned from non-New Jersey sources.

At the trial of this case, plaintiff offered no evidence of either the time taxes were paid nor the filing of refund claims. The court, in its opinion of October 18, 1994, ruled that plaintiff's counsel's letter of November 6, 1991, constituted a timely refund claim with respect to gross income taxes for the years 1984 and 1986, paid by Antar on December 7, 1989. The amount of such payment was $71,031.58. Subsequently, however, defendant moved for

partial summary judgment with respect to all but $11,943.80 of the payment, on the ground that the difference was attributable to interest and penalties assessed by the Director of the Division of Taxation, on or about February 13, 1989. Thus, the limitation on the filing of a refund claim, to the extent of the interest and penalties assessed by the Director on February 13, 1989, was not three years from the filing of the return, or two years from the payment of the tax. Rather, the claim for refund of the amounts assessed as indicated was required to be filed no later than ninety days after the assessment. *Vicoa v. Director, Div. of Taxation*, 166 *N.J. Super.* 496 (App. Div. 1979). The court granted defendant's motion for partial summary judgment on December 12, 1996.

Accordingly, the only amount with respect to which a timely refund claim was made by plaintiff is $11,943.80.

Plaintiff also claims that no nexus existed between Antar and the State of New Jersey so as to enable the latter to tax Antar's income. Antar, plaintiff claims, was not a resident of this State, and any assertion of New Jersey's power to tax Antar's income earned elsewhere violates the Fourteenth Amendment to the United States Constitution.

Plaintiff's claim must fail for several reasons. First, the court cannot consider any refund claim not filed within the time prescribed by statute, even if the claim is based upon an alleged violation of the taxpayer's constitutional rights. *Continental Trailways v. Director, Division of Motor Vehicles*, 102 *N.J.* 526 (1986), *cert. den.* 481 *U.S.* 1001,107 *S. Ct.* 1636,95 L.ed. 2d 195 (1987).

In the second place, the claim of unconstitutional deprivation must be rejected where, as here, the taxpayer voluntarily files tax returns and pays the tax shown to be due on those returns. It is only when a state attempts to exert its jurisdiction beyond its borders that a violation of due process occurs. Antar's voluntary payments of tax to New Jersey as though he were a resident, and New Jersey's retention of those payments, do not constitute a violation of Antar's

rights. New Jersey did not attempt to reach beyond its borders to assess or collect the tax. Rather, Antar brought himself and the monies he paid as gross income tax into this jurisdiction, either by mistake, or as plaintiff alleges, by way of a deliberate act intended to defraud the State of New York. In either event, Antar's own acts, which were neither compelled nor sought by the State of New Jersey, conferred jurisdiction upon the State over the tax monies at issue and cannot constitute the basis of a violation of Antar's due process rights.

The United States Supreme Court has recently reaffirmed the principle that, consistent with due process, jurisdiction to tax may be conferred on a state by the actions of a taxpayer. Whether a state may impose a tax without violating due process centers around the same considerations that determine whether a state may impose *in personam* jurisdiction. *Quill Corp. v. North Dakota*, 504 *U.S.* 298, 112 *S.Ct.* 1904, 119 L.ed. 2d 91 (1992).

The State's receipt and retention of Antar's tax payments doe snot offend traditional notions of fair play and substantial justice where, as here, the State neither compelled nor required tax payments, which were voluntarily made by Antar for reasons known only to him. The State did not seek to impose its jurisdiction to tax Antar; rather he conferred that jurisdiction on the State, and neither he nor plaintiff can now complain that Antar's due process rights were violated. The Due Process Clause may not readily be wielded as a territorial shield to avoid interstate obligations that have been voluntarily assumed. *Burger King Corporation v. Rudewicz*, 471 *U.S.* 462, 473-474, 105 *S.Ct.* 2174, 2182-2183, 85 L.ed. 2d 528,541 (1985) (citations omitted).

In the third place, plaintiff has not presented evidence sufficient to establish that New Jersey lacked the jurisdiction to tax Antar on the income in issue here.

Plaintiff also contends that it is a violation of equal protection for New Jersey to grant its residents the right to readjust their income and claim a credit against their New Jersey gross income tax obligation for taxes paid t another jurisdiction, when it does not grant nonresidents similar readjustment. It is asserted that the lack of a corresponding credit for nonresidents results in the double taxation of their income, while New Jersey residents are taxed only once, by the foreign jurisdiction, on such income.

It should be noted at the outset, that the Due Process Clause does not bar the taxation of intangibles, or the income derived therefrom, by more than one jurisdiction. *Curry v. McCandless*, 307 *U.S.* 357, 369-370, 59 S.Ct. 900,907,83 L.ed. 1339, 1349 (1939). The granting of a credit to residents of a state for income earned outside the jurisdiction of that state and taxed by another state is a matter of legislative grace, and not a constitutional requirement. *See Oklahoma Tax Commission v. Chickasaw Nation*, __ U.S. ___, 115 *S.Ct.* at 2223, n.12, 132 L.ed. 2d at ___, n.12. New Jersey has, nevertheless, determined to grant its residents a credit for taxes paid to another jurisdiction. That credit does not violate either the Equal Protection clause or the Privileges and Immunities Clause of the United States Constitution.

The State taxes residents on all their income, wherever earned, as it is constitutionally permitted to do so. *N.J.S.A.* 54A:5-1; *New York v. ex. rel. Cohn v. Graves*, 300 *U.S.* 308, 312-313, 57 *S.Ct.* 466,467-468,81 L.ed. 666 (1937); it taxes only the New Jersey source of nonresidents, which is also constitutionally valid. *N.J.S.A.* 54A:5-5, -8. *Travis v. Yale & Towne Mfg. Co.*, 252 *U.S.* 60,40 *S.Ct.* 228,64 L.ed. 460 (1920); *Shaffer v. Carter*, 252 *U.S.* 37,57,40 *S.Ct.* 221,227,64 L.ed. 445,458 (1920).

The credit given to residents is for tax paid to other jurisdictions which, like New Jersey, may validly tax nonresidents only with respect to income which is sourced within the borders of that taxing jurisdiction. Consequently, New Jersey imposes a tax, without credit, on the New Jersey

source income of both its residents and nonresidents. It additionally taxes its residents with respect to non-New Jersey source income, for which a credit may be granted if another jurisdiction has taxed the same income. New Jersey never imposes a tax on the non-New Jersey source income of nonresidents, and therefore, makes no provision for credit for tax paid by other jurisdictions, or for readjustment of tax paid to New Jersey if another jurisdiction thereafter requires the nonresident to pay additional tax on non-New Jersey source income. See *Estate of Guzzardi v. Director, Div. of Taxation*, 15 *N.J. Tax* 127,133 (Tax 1982) (the intent of the Gross Income Tax Act is to avoid double taxation of none-New Jersey source income, but not to relinquish New Jersey tax on income earned in New Jersey).

Consistent with the privileges and immunities and equal protection clauses, a state may limit the deductions taken by a nonresident to those associated with the income earned in the state while permitting residents to take deductions for expenses incurred anywhere. *Shaffer v. Carter*, supra.

The logic is the same with respect to credits. There is, thus, no illegal discriminatory treatment of nonresidents by the Gross Income Tax Act. Its treatment of residents and nonresidents is precisely the same, except that residents are additionally taxed on non-New Jersey source income (for which they are eligible for credit against New Jersey taxes) while nonresidents are not. The credit about which plaintiff complains is applied only against income which is not taxed at all by New Jersey with respect to nonresidents.

In *Leach v. Chu*, 540 *N.Y.S.* 2d 596 (N.Y. App. Div. 1989), appeal dismissed 546 *N.Y.S.* 2d 244 (1989), the court rejected similar claims that the resident credit violated the taxpayer's equal protection rights and the privileges and immunities clause. The court noted that the credit applied only to income earned in and taxed by another jurisdiction and that neither residents nor nonresidents were eligible for the credit with respect to income earned in New York. The

taxpayer was not, therefore, being denied any benefit granted to New York residents.

If Antar were a nonresident of New Jersey, a fact which plaintiff has failed to establish with credible evidence, his overpayment of tax is not a result of any discriminatory statutory scheme but was simply an overpayment. Any double taxation which a taxpayer may suffer for lack of a nonresident credit is not a consequence of the provisions of the Gross Income Tax Act. New Jersey neither demands nor enforces against a nonresident a tax against income sourced in and properly taxed by another jurisdiction. If a nonresident pays tax on non-New Jersey source income, whether by mistake, or as alleged here, as a result of a scheme to avoid payment of taxes in another jurisdiction, that is no more than a simple overpayment for which a remedy is provided by *N.J.S.A.* 54A:9-8(a), and for which a claim must be timely filed. He may not recover such an overpayment in the guise of a readjustment of tax pursuant to *N.J.S.A.* 54A:4-1, for which a claim may be made at any time.

In view of the foregoing, this court concludes that all plaintiff's claims remaining after this court's opinion of October 18, 1994, as modified by the order of December 12, 1996, entered pursuant to defendant's motion for partial summary judgment, are without merit and will be dismissed.

Counsel for defendant will prepare the appropriate judgment and submit pursuant to *R.* 4:42-1(c) (the five-day rule).